



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 590 OF 2014

OMULELE & TOLLO ADVOCATES. APPLICANT

VERSUS

MAGNUM PROPERTIES LIMITED. RESPONDENT

R U L I N G

The Application for consideration by the court is the one dated 27th February, 2015 by way of a Notice of Motion. The same is brought under section 51(2) of the Advocates Act (Cap 16) Laws of Kenya, Sections 1A, 1B of the Civil Procedure Act (Cap 21) Laws of Kenya, Article 159 of the Constitution of Kenya 2010.

The Application seeks the following orders: -

- a. Spent
- b. There be a stay of taxation of the Applicant's Bill of Costs scheduled for taxation on 13th February, 2015 until further orders of this Honourable Court.
- c. The Honourable Judge do give directions and determine whether retainer existed between the firm of **OMULELE & TOLLO, ADVOCATES** and make appropriate Orders.
- d. The Honourable Judge do dismiss the Application for taxation filed by **OMULELE & TOLLO ADVOCATES**.
- e. Costs of the Application be provided for.

The Application is premised on the following grounds: -

1. The Respondent/Applicant herein never at any time retained the services of the firm of **OMULELE & TOLLO ADVOCATES**.
2. The Applicant retained the services of **OMULELE & CO. ADVOCATES** orally whereby there was a monthly payment of Kshs.150,000/- and the same is fully paid and there are no arrears.
3. The Respondent/Applicant is a stranger to the Bill of Costs filed by the firm of **OMULELE & TOLLO ADVOCATES** who it has never instructed.
4. The Bill of Costs is frivolous and an abuse of the court process and the same ought to be dismissed with costs.
5. The Principal to be sued is the firm of **OMULELE & CO. ADVOCATES** if at all it instructed the firm of **OMULELE & TOLLO ADVOCATES** which is denied as no work has been done by the said firm with the Respondents knowledge.

The Application is supported by the Affidavit of **ASHOK DOSHI** sworn on the 27th February, 2015.

In the said affidavit he depones that he did not instruct the firm of **OMULELE & TOLLO ADVOCATES** but he admits having instructed the firm of **OMULELE & CO. ADVOCATES** but their Advocate/Client relationship ended in the year 2012.

According to him, they had made all the payments as agreed on monthly retainer and there are no arrears and that when the firm of Omulele & Tollo Advocates filed a Notice of Change of Advocates on the 17th day of February, 2014, they did not inform him and the said firm did not have his instructions at all.

He depones that the Bill of Costs filed by the Applicant is frivolous and the same ought to be dismissed as the notice of change of Advocates was filed merely to enable the said firm of Advocates file their Bill of Costs.

The Application is opposed vide a Replying Affidavit by Ray Tollo sworn on the 25th May, 2015 and a supplementary Affidavit sworn by Christopher Omulele on the 12th day of June, 2015. The deponents herein are partners in the firm of Omulele & Tollo Advocates (the Applicant herein). I will consider the two Affidavits together.

The summary of facts as contained in the said Affidavits are that, initially the firm of Omulele & Co. Advocates was a sole proprietorship whose sole proprietor was Mr. Christopher Omulele as at the time the Respondent instructed it to act on its behalf in Nairobi ELC No. 559 of 2011 on 4th November, 2011.

Later on, the firm of Omulele & Co. Advocates introduced a partner who is the deponent to the Affidavit sworn on 25th May, 2015, Ray Tollo Advocate and the resultant partnership was now known as Omulele & Tollo Advocates. Pursuant to the change hereof, a notice of change of Advocates was filed in the matter on the 17th February, 2014.

That upon joining the firm as a partner, Mr. Ray Tollo Advocate was introduced to Mr. Ashok Doshi as the Managing Partner in the firm of Omulele & Tollo Advocates on or about the 6th day of January, 2014 in a meeting that was held in Mombasa that was attended by Mr. Ashok Doshi, Ray Tollo himself, Mr. Pherozee Nowrojee and Christopher Omulele Advocate. At the said meeting Mr. Ashok Doshi was advised by Mr. Omulele Advocate that Mr. Ray Tollo would from then handle all the matters that were pending with the said firm and which he had an interest in whether personally or as a director of a lawfully registered company which included the Respondent herein.

That Mr. Ashok Doshi did not object to Mr. Ray Tollo's handling of the matters aforesaid and henceforth Mr. Tollo handled all the matters including the Respondent's defence in Nairobi ELC 559 of 2011 (**Greenview Lodge Limited Vs Harit Sheth Advocates and Magnum Properties Limited**) herein referred to as the suit.

That in the course of representation in the aforesaid matter Mr. Ashok and Mr. Tollo exchanged numerous emails, telephone calls and were involved in client interviews and in particular, it was Mr. Tollo who prepared Mr. Ashok Doshi for trial in the suit for the hearing that was scheduled on the 27th May, 2014 and on the scheduled date, Mr. Ashok was in court and it was Mr. Tollo Advocate appeared for him and there was no objection from Mr. Ashok.

I have carefully considered the Application together with the supporting affidavit, the replying affidavit, the supplementary affidavit plus the submissions made by the learned counsels.

In my view, there is only one issue that this Honourable court is called upon to decide and that is, whether retainer existed between the firm of Omulele & Tollo Advocates and the Respondent herein.

I will start by considering what a retainer is and what it entails and in so doing, I wish to borrow the words of Justice Gikonyo in the case of **Njeru Nyaga & Co. Advocates Vs George Ngure Kariuki**, High Court of Kenya at Nairobi (Commercial & Admiralty Division) Case No. 723 of 2012 where the learned Judge said and I quote: -

“This word retainer has attracted serious judicial toiling and rending of minds in a bid to assign it a meaning within the provisions of the Advocates Act, probably because of the special position the word occupies in the advocate-client relationship. Although the present case does not fall under Section 51(2) of the Advocates Act, the innumerable previous courts’ rendition on the phraseology...where the retainer is not disputed...provide the content of the term ‘retainer’”. ‘Retainer’ in the wider sense entails the instructions by a client or a client’s authorization for a lawyer to act in a case or a fee paid to an advocate to act in a matter during a specified period or a specified matter, or a fee paid in advance for work to be performed by the lawyer in the future. See the BLACK’S LAW DICTIONARY, 9TH EDITION. The appropriate sense of the word ‘retainer’ as used in the Advocates Act and which is relevant to this application was aptly provided by Waweru J and Ochieng J in the cases of NBI HC MISC APP NO 698 OF 2004 A.N. NDAMBIRI & CO ADVOCATES v MWEA RICE GROWERS MULTIPURPOSE CO-OP LIMITED, and OWINO OKEYO & CO ADVOCATES v FUELEX KENYA LIMITED [2005] eKLR, respectively. Let me quote what Waweru J said in the former case that;

My understanding of the term ‘retainer’ as used in section 51(2) aforesaid [read...of the Advocates Act] is instructions to act in the matter in which the costs have been taxed. I do not, with respect, subscribe to the view that ‘retainer’ means an agreement in writing as to the fees to be paid. Needless to say, where there is such agreement, taxation would hardly be necessary. In the circumstances I find that there is no dispute as to retainer.”

The term ***“retainer”*** was also considered in the case of **Hezekia Ogao Abuya T/a Abuya & Co. Advocates Vs Kunguru Food Complex Limited** Nairobi, Misc. Appl. No. 400/2001 where an advocate who had been instructed by a client in a conveyance matter had his Advocate/Client Bill of Costs taxed and a judgment under Section 51(2) entered in his favour, in an Application by the client to set aside the said judgment inter-alia, on the ground that there was no retainer, Ringera J (as he then was) delivered himself at page 6 therefor: -

“in this case, such a defence is predicated on the client’s understanding of the word “retainer” in that regard, I note that in Black’s Law Dictionary the word retainer is explained as follows: -

“In the practice of law, when a client hires an attorney to represent him, the client is said to have retained the Attorney. This Act of employment is called the retainer. The retainer agreement between the client and the Attorney sets forth the nature of services to be performed, costs expense and related matters.”

In Stroud’s Judicial Dictionary of words and phrases, 1986, Vol 4 at page 2283 it is posited that to retain is ***“is to keep in pay” “to hire”***. And in words and phrases legally defined 2nd Edition Vol 4 by J. B. Sainders (ed) it is posited that: -

“The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor’s retainer by that client: - consequently, the giving of a retainer is equivalent to the making of a contract for the solicitor’s employment.”

Then in the Oxford Advanced Learners Dictionary of Current English, the word retainer is defined in one usage as to secure the services of somebody especially a lawyer, by paying for them in advance.

An Advocate duly instructed is retained and where there is no dispute that an Advocate was duly instructed by the client in any matter, the retainer cannot be said to be in dispute.

“Justice Njagi, J in the case of Nyakundi & Co. Advocates gave the definition and form of retainer from Halsbury’s Law of England, 4th Edition, Re issue at paragraph 99, page 83 where it stated: -

“The act of authorizing or employing a solicitor to act on behalf of a client constitutes the

solicitor's retainer by that client. Thus the giving of a retainer is equivalent to the making of a contract for the solicitor's employment. Njagi J pointed out that in the same work, it is further explained that a retainer need not be in writing unless, under the general law of contract, the terms of the retainer or the disability of a party, to it make writing requisite. It is then further stated, the Judge added at paragraph 103 "even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case."

In the case before me, it is the Applicant's contention that the retainer was between it and the firm of Omulele & Co. Advocates and not the firm of Omulele Tollo & Co. Advocates and that the Respondent was not informed of any change of Advocates until they were served with a Bill of Costs by the firm of Omulele Tollo & Co. Advocates.

Mr. Velo Advocate for the Applicant argued that a similar Application was filed in Mombasa in case No. 2 of 2015 and the same was decided by Justice Omollo in favour of the Applicant pursuant to which the Respondent, filed an appeal which is still pending hearing and that the matter before me was stayed pending the hearing and determination of the Appeal. There was however, no evidence to the effect that this matter has been stayed and this was disputed by the Advocate for the Applicant.

In his submissions, Mr. Tollo for the Applicant submitted that the Bill of Costs came up for hearing on the 4th December, 2014 and parties agreed to dispose off the same by way of written submissions which they filed and exchanged and closed on the 20th March, 2015 and according to him, the hearing of the Bill of Costs closed on that date. A ruling date was given by the taxing master for 8th April, 2015. As the parties were awaiting the ruling, the Respondent filed the present Application on the 24th March, 2015 and it's as a result of this development that the taxing officer ordered that the Application on retainer be heard by a Judge.

According to the Applicant, the Application herein has been overtaken by events and counsel referred the court to the case of **Kenneth Kiplagat Vs National Housing Corporation** where it was stated that all objections must be raised at the hearing of the bill of costs. The counsel for the Applicant contended that the Application was filed belatedly after the hearing of the Bill of Costs had concluded and a ruling date given and that the objection should have been raised before. On this issue, I have looked at the case of Kiplagat referred to and its circumstances are different from the case before me. In the Kiplagat case, no objection was raised until after the bill had been taxed by the taxing officer while in the case herein, the same was done before the taxing officer could finalize with the taxation. The objection was raised when the bill was pending ruling and it is at that point that it was referred to a Judge for determination of the issue of the "**retainer**". I find that though the Application came a bit late in the day, it is in the interest of justice that the Respondent is heard on the issue of the retainer which in any event will determine the fate of the Bill of Costs.

On the issue of the retainer, I have said enough in this judgment to explain what a retainer is. The cases cited hereinbefore have brought out clearly, the difference between a "**retainer**" and a "**retainer agreement**".

In this case, the Respondent has called upon the court to determine whether there was a retainer between it and the firm of Omulele Tollo & Co. Advocates. I think I have done enough to show that a retainer does not have to be in writing but the same can be inferred from the conduct of the parties or the circumstances of the case. In the case before the court, the Applicant has exhibited enough material before the court to show that an Advocate/Client relationship existed between it and the Respondent and at all material times, the Respondent was aware of the changes that took place in the firm of Omulele & Co. Advocates which included bringing in a new partner who was introduced to the Respondent at a meeting in Mombasa held on the 6th January, 2014 and after the introduction he handled the legal docket of the Respondent. Mr. Tollo Advocate even attended court on the 27th May, 2014 for a hearing of the Respondent's matter and Mr. Ashok Doshi was present in court.

The Advocate/Client relationship between the Applicant and the Respondent continued after 2012 and

this is evidenced by Mr. Tollo Advocate's attendance in court on the 27th May, 2014, but going by the evidence available to this court, upto and including the month of September, 2012, there was a retainer fees of Ksh.150,000/- per month. This is supported by the invoices filed on 13th January, 2015 as annexures. The same dates back to the year 2009 and they were sent every month until September, 2012.

In my view, this then means that upto the month of September, 2012, there was a retainer agreement on fees payable to Omulele & Co. Advocates every month but from then hence, though the said firm continued offering legal services even after the inclusion of the new partner it is not clear whether their fees were paid or not.

It is, therefore, the finding by this Honourable Court that there was a retainer between the Applicant and the Respondent and the filing of a Notice of Change of Advocates was just but a mere legal procedure which should not disentitle the Applicant their legal fees and in the premises the most appropriate order in the circumstances is to allow the taxation pending before the taxing officer to proceed.

I find no merit in the Application dated 27th February, 2015 and the same is dismissed with costs.

Dated, signed and delivered at Nairobi this 18th day of February, 2016.

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L NJUGUNA

JUDGE

In the presence

..... ***for the Applicant***

..... ***for the Respondent***